IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FOTOMEDIA TECHNOLOGIES, LLC Plaintiff, v. AOL LLC, AMERICA ONLINE, INC., PHOTOBUCKET.COM, INC., SHUTTERFLY, INC., CNET NETWORKS, INC., AND YAHOO! INC., Defendants.	§ § § § § § § § § § § §	Case No. 2:07-CV-255-TJW Judge: Honorable T. John Ward **JURY TRIAL DEMANDED**

AOL LLC'S NOTICE OF JOINDER IN PHOTOBUCKET'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT, AND MOTION TO STRIKE; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

AOL LLC ("AOL") adopts and joins for all purposes Photobucket Inc.'s Motion to Dismiss for Failure to State a Claim under Fed. R. Civ. P. 12(b)(6), or, in the Alternative, Motion for a More Definite Statement, and Motion to Strike, and Memorandum of Points and Authorities in Support Thereof ("Motion").

In addition to the argument presented, Fotomedia Technologies, LLC ("FotoMedia") failed to plead facts sufficient to place AOL on notice as to what it must defend. For instance, the Complaint identifies AOL's "pictures.aol.com" website as the accused product, but fails to identify which program or programs on this website purportedly infringe the patents-in-suit. There are multiple sections on AOL's website, and each section includes a wide array of different products, services, and functions. FotoMedia must, at a minimum, specify whether or not it accuses *each section* of the pictures.aol.com website, only specific sections, or any other

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AOL website. *See, e.g., eSoft, Inc. v. Astaro Corp.,* No. 06-CV-00441-REB-MEH, 2006 WL 2164454, at *2 (D. Colo. July 31, 2006) (granting motion for more definite statement before the U.S. Supreme Court issued its decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), based on the failure to identify a particular product or service on a website that infringed the patents-in-suit). FotoMedia also should be required to specifically plead which of the patents-in-suit are infringed by each accused section of the pictures.aol.com website, or by any other AOL website accused of infringment. *See, e.g., Bay Indus., Inc. v. Tru-Arx Mfg. LLC*, No. 06-C-1010, 2006 WL 3469599, at *1-2 (E.D. Wis. Nov. 29, 2006) (granting accused infringer's motion for a more definite statement under Fed. R. Civ. P. 12(e) because plaintiff failed to adequately identify either an infringing product, or to which of defendant's products were alleged to have infringed which claim of the patent-in-suit). Similarly, FotoMedia should be required to specifically plead the facts which it relies upon to supports its allegations of indirect and willful infringement. *See* Photobucket Inc.'s Motion to Dismiss or, in the Alternative, for a More Definite Statement, and Motion to Strike; and Memorandum of Points and Authorities in Support Thereof at 3-7.

Plaintiff may argue that *McZeal v. Sprint Nextel Corp.*, No. 2006-1548, 2007 WL 2683705 (Fed. Cir. Sept. 14, 2007), allows for a lower pleading standard than requested by the parties. Such a position would be without merit. *McZeal* was a case brought by a pro se litigant where the plaintiff alleged direct infringement under the doctrine of equivalents. *McZeal* did not address the sufficiency of pleading of indirect infringement or willfulness and admittedly gave more leniency to a *pro se* litigant than a party such as FotoMedia, which is represented by counsel. Furthermore, even *McZeal* acknowledged that sufficient pleading required notice from the plaintiff to the defendant of alleged infringement. *Id*. at *2. Such a pleading is lacking in this case. Absent facts to support its allegations of willful and indirect infringement, FotoMedia's complaint fails to provide AOL "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp.*, 127 S. Ct. at 1964.

AOL joins in the position of Photobucket that Plaintiff has not adequately pled its claims for willful and indirect infringement, and thus these claims should be dismissed. In the alternative, if the Court does not dismiss FotoMedia's claims, it should be required to submit an amended complaint that allows AOL to properly respond to Plaintiff's complaint.

Whereas, AOL respectfully requests that this Court permit AOL to join in and adopt this Motion in its entirety; grant the relief requested in the Motion; and grant AOL such other and further relief, at law and in equity, to which it may be entitled.

Dated: September 17, 2007

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this 17th day of September, 2007.

_____/s/_________________________
Harry L. Gillam, Jr.